

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

NITHYA VINAYAGAM,

Plaintiff,

v.

US DEPARTMENT OF LABOR,
ADMINISTRATIVE REVIEW BOARD,
et. al.,

Defendants.

Case No. 2:18-cv-01206-RFB-DJA

ORDER

Before the Court for consideration is Plaintiff Nithya Vinayagam's MOTION to Amend 20 Amended Complaint (ECF No. 26).

I. BACKGROUND

On July 2, 2018, Plaintiff filed a motion to proceed in forma pauperis ("IFP"), attaching her Complaint against Defendants. ECF No. 1. After denying and allowing her to refile the IFP motion, the Court granted the motion on July 19, 2019. ECF Nos. 3, 4, 7. In that same order, the Court dismissed her first amended complaint, finding that it failed to state a claim upon which relief could be granted. The Court granted her leave to file an amended complaint. See ECF No. 7. Plaintiff filed her second amended complaint on August 16, 2019. Once again, the Court dismissed the complaint without prejudice for failure to state a claim upon which relief could be granted. ECF No. 11. The Court's March 23, 2020 Order noted that it was unclear, based on the

1 allegations, whether it could even assert subject matter and personal jurisdiction over this action.
2 Further, there appeared to be significant venue and res judicata issues. Id. As a result, the Court
3 allowed Plaintiff to file an amended complaint by April 23, 2020. Id. Plaintiff failed to comply,
4 and Magistrate Judge, Daniel J. Albregts, submitted a Report and Recommendation on April 27,
5 2020, recommending dismissal of this action without prejudice for failure to comply. ECF No. 12,
6 15. Without any response to the Report and Recommendation, the undersigned agreed with Judge
7 Albregts. See ECF No. 15.

9 On August 3, 2020, Plaintiff filed a motion to vacate the Court's Judgment, following
10 dismissal of her action. ECF No. 17. She asserted that she was not able to respond to the Report
11 and Recommendation because the COVID-19 pandemic had disrupted international mail
12 exchanges, and therefore Plaintiff requested that she be allowed to file her third amended
13 complaint. Id. The Court found this constituted a reasonable excuse and granted Plaintiff partial
14 relief from the Judgment to determine whether an amended complaint could cure the deficiencies
15 in her earlier pleadings. ECF No. 18. Plaintiff was given an opportunity to file a motion for
16 reconsideration with her proposed third amended complaint for the Court's consideration. Id.

19 On May 29, 2021, Plaintiff filed a motion for reconsideration and an amended complaint.
20 ECF Nos. 19, 20. On March 31, 2022, the Court evaluated Plaintiff's third amended complaint and
21 found that it violated Federal Rules of Civil Procedure 8, 10, 18, and 20. ECF No. 25. Nevertheless,
22 the amended complaint appeared to state at least some claims which it could recognize. The Court,
23 however, was still unable able to discern Plaintiff's claims and which Defendants the claims were
24 brought against. Id. Accordingly, the Court granted Plaintiff's motion for reconsideration in part,
25 allowing Plaintiff one final opportunity to file a complaint that followed the Federal Rules of Civil
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1 Procedure. Id. Plaintiff then filed the instant motion to amend the complaint, attaching the
2 proposed Fourth Amended Complaint. See ECF No. 26.

3 This Order follows.
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5 6 **II. LEGAL STANDARD**

7 A complaint filed in federal court must contain “a short and plain statement of the claim
8 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(1). Each allegation must be
9 simple, concise, and direct. Each claim must be stated in numbered paragraphs, and each numbered
10 paragraph limited as far as practicable to a single set of circumstances. Fed. R. Civ. P. 10. Pursuant
11 to Federal Rule of Civil Procedure 20(a)(2), Defendants may only be permissively joined in one
12 action if: “(A) any right to relief is asserted against them jointly, severally, or in the alternative
13 with respect to or arising out of the same transaction, occurrence, or series of transactions or
14 occurrences; and (B) any question of law or fact common to all defendants will arise in the action.”
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16 Amendment of pleadings, if requested before the deadline to do so, is governed by Rule 15
17 of the Federal Rules of Civil Procedure. AmerisourceBergen Corp. v. Dialysist West, Inc., 465
18 F.3d 946, 952 (9th Cir. 2006). Rule 15 states that courts should freely grant a party leave to amend
19 “when justice so requires.” Fed. R. Civ. P. 15(a)(2). Courts are to apply this policy with “extreme
20 liberality.” Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001). In
21 general, leave to amend under Rule 15 should be denied only where there is a “showing of bad
22 faith, undue delay, futility, or undue prejudice to the opposing party”—considerations commonly
23 referred to as the Foman factors. Chudacoff v. Univ. Med. Ctr. of S. Nev., 649 F.3d 1143, 1152
24 (9th Cir. 2011); Foman v. Davis, 371 U.S. 178, 182 (1962).
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1 III. DISCUSSION

2 As a preliminary matter, the Court does not find that granting leave to amend would cause
 3 undue delay or prejudice Defendants. Defendants have yet to be served with the operative
 4 complaint in this action and no dispositive motions have been filed. The Court is therefore left to
 5 consider whether granting leave to amend would be futile. “[A] proposed amendment is futile only
 6 if no set of facts can be proved under the amendment to the pleadings that would constitute a valid
 7 and sufficient claim or defense.” Sweaney v. Ada County, 119 F.3d 1385, 1393 (9th Cir. 1997).
 8 Courts must “liberally construe the inartful pleading of pro se litigants. It is settled that the
 9 allegations of a pro se litigant’s complaint, however, “inartfully pleaded are held to less stringent
 10 standards than formal pleadings drafted by lawyers.” Eldridge v. Block, 832 F.2d 1132, 1137 (9th
 11 Cir. 1987) (cleaned up).

12 a. General Allegations

13 Plaintiff’s proposed Fourth Amended Complaint asserts 28 causes of action stemming from
 14 her 2007 recruitment by Eis Technologies’s (“Eis”) to work in Georgia through the United States’s
 15 H-1B Visa Program. She moved from India to serve as a Senior Consultant, but alleges that, in
 16 doing so, she was subjected to misrepresentations regarding her H-1B visa petition. Even though
 17 she thought she would work for Eis, when she arrived in the United States her employer was
 18 actually Cronous. In addition to failing to pay her certain wages, these Defendants asked her to
 19 engage in fraudulent work-related conduct, which she refused to do. Eis and Cronous jeopardized
 20 her visa status, including by misrepresenting that Cronous was shutting down,. Plaintiff alleges
 21 that she then filed a wage and hour complaint in 2009 with the U.S. Department of Labor (“DOL”)
 22 – Wage and Hour Division (“WHD”) in Atlanta, Georgia. The case was decided against her and
 23 she appealed to the U.S. Court of Appeals for Ninth Circuit. Further, Plaintiff secured back wages
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1 as a result of a 2011 settlement of a civil lawsuit filed in Atlanta, Georgia against Eis, Cronous,
 2 Swapna Pasham (Cronous's president), Kiran Pasham (Eis's vice president), and Naveen Miglani
 3 (Eis and Cronous's owner and principle). She alleges, however, that this settlement is invalid
 4 because it was agreed to under fraudulent conditions.¹ She also alleges that WHD employees
 5 engaged in fraudulent conduct, including concealing facts pertinent facts related to her WHD
 6 complaint. Plaintiff ended up appealing, pro se, the U.S. DOL's Administrative Review Board
 7 ("ARB") decision of her complaint with the District Court of Nevada in June 2018.² As a result of
 8 this conduct, Plaintiff is unable to return to the United States or get a job, including in India.
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10 Plaintiff's proposed Fourth Amended Complaint names Eis, Cronous, Swapna Pasham,
 11 Kiran Pasham, Naveen Miglani, Neelam Miglani (Cronous's CEO), Vikram Sudini (Eis and
 12 Cronous's human resources manager), and Kowsala Rajendra (Eis and Cronous's accountant). In
 13 addition to naming WHD and the ARB, the complaint also names Linda Sneed, a wage and hour
 14 investigator for the DOL in Atlanta, Georgia and Debra Brown, the assistant district director of
 15 the DOL. The amended complaint challenges alleged visa fraud and fraud in foreign labor
 16 contracting committed by Eis and Cronous. She also asserts RICO claims and various fraud-based
 17 claims against Eis, Cronous, and their officers, directors, and employees. She also alleges federal
 18 tort claims against WHD and ARB. Finally, Plaintiff seeks damages and the lifting of United the
 19 States's ban on her entering the country.
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22 **b. Causes of Action**

23 **i. FTCA Based Causes of Actions**

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 27 ¹ She alleges that attorneys she hired to represent her in proceedings related to the WHD complaint also
 28 engaged in fraudulent conduct against her. She filed separate complaints against these attorneys, and they are not
 named as Defendants in the instant proposed fourth amended complaint.

² Plaintiff's original complaint was attached to her July 2018 motion to proceed IFP. See ECF No. 1.

As a preliminary matter, the Court finds that allowing Plaintiff's Federal Tort Claims Act based causes of actions to proceed against WHD, ARB, Sneed, and Brown would be futile. These are proposed causes of action Twenty Three through Twenty Eight. Absent a waiver, sovereign immunity shields the Federal Government and its agencies from lawsuits against them. FDIC v. Meyer, 510 U.S. 471, 475 (1994). Additionally, "[t]he FTCA provides a limited waiver of the sovereign immunity of the United States for torts committed by federal employees acting within the scope of their employment." Nurse v. United States, 226 F.3d 996, 1000 (9th Cir. 2000). Section 2680 of 28 U.S.C. limits the United States's waiver of sovereign immunity under the FTCA by its bar of a tort claim for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h) (emphasis added).

All Plaintiff's FTCA causes of action allege that WHD, ARB, Sneed, and Brown misrepresented and deceived her and others regarding her WHD complaint. The FTCA, however, has not waived sovereign immunity for claims like these which sound in fraud and misrepresentation. See Kim v. United States, 940 F.3d 484, 492 (9th Cir. 2019). Therefore, the proposed Fourth Amended Complaint's Twenty Third Cause of Action, Twenty Fourth Cause of Action, Twenty Fifth Cause of Action, Twenty Sixth Cause of Action, Twenty Seventh Cause of Action, and Twenty Eighth Cause of Action would all fail as a matter of law. Therefore, the Court finds that allowing amendment in favor of all these causes of action would be futile.³

ii. Federal Criminal Statute Based Causes of Action

³ None of Plaintiff's causes of action name Sneed and Brown, except those under the FTCA. Moreover, the proposed Fourth Amended Complaint does not allege they acted outside the scope of their employment. Therefore, despite the proposed complaint recognizing Sneed and Brown as individuals, the Court does not construe any causes of action against them as being raised in their individual capacities.

1. Proposed Causes of Action that are Futile

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1 These statutes, however, do not give rise to private causes of action. See Henry v. Universal
2 Tech. Inst., 559 Fed. App’x 648, 650 (9th Cir. 2014) (affirming dismissal of claim under 18 U.S.C.
3 § 371 because the statute does not provide for a private right of action); Gonzales v. Caremore
4 Health Plan, Inc., No. 15-cv-1499, 2015 WL 6394467, at *2 (C.D. Cal. Oct. 22, 2015) (finding no
5 private right of action in 18 U.S.C. 1324(a)); Kemp v. Place All. L.L.C., No. 22-CV-262-PGB-
6 LHP, 2022 WL 3136895, at *3 (M.D. Fla. June 15, 2022), report and recommendation adopted,
7 No. 22-CV-262-PGB-LHP, 2022 WL 3136884 (M.D. Fla. July 11, 2022) (finding no private right
8 of action available under 18 U.S.C. § 1351); Valero v. Bac Home Loans Servicing, LP, 667 F.
9 App’x 255 (9th Cir. 2016) (finding that there is not private civil right of action provided by 18
10 U.S.C. §§ 1621, 1341, 1343); Willems v. Apartment Inv. & Mgmt. Co. AIMCO, 72 F. App’x 700,
11 701 (9th Cir. 2003) (finding that “18 U.S.C. § 1001 does not provide a private right of action”);
12 Govindharajan v. Tata Consultancy Servs., Ltd., No. 19-CV-10017, 2020 WL 4016109, at *9
13 (S.D.N.Y. July 16, 2020) (finding no private right of action available under 18 U.S.C. § 1546(a));
14 Walsh v. Krantz, 386 F. App’x 334, 336 (3d Cir. 2010) (affirming district court dismissal that
15 found that there was no “private right of enforcement” for violations of 18 U.S.C. § 875); Afshari
16 v. Montana Black Gold, No. 20-5362, 2020 WL 9217980, at *3 (6th Cir. Dec. 17, 2020) (affirming
17 district court finding that there was no private right of action for a violation of 18 U.S.C. § 873);
18 Lemke v. Jander, No. 20-CV-362, 2021 WL 778653, at *4 (S.D. Cal. Mar. 1, 2021) (finding that
19 “there is no private right of action in 26 U.S.C. § 7201”).
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24 Separately, the Seventh, Eighth, and Nineteenth Causes of Action seem to assert that the
25 named Defendants violated 31 U.S.C. § 3729(a)(1)(G). This statute is part of the False Claims Act,
26 31 U.S.C. § 3729. Such a claim, however, requires a relator, and “a relator cannot pursue a FCA
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1 claim pro se.” United States ex rel. Welch v. My Left Foot Children's Therapy, LLC, 871 F.3d
2 791, 800 n.2 (9th Cir. 2017).

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4 Next, the Sixteenth Cause of Action is alleged against Defendants Kowsala Rajendra and
5 Swapna Pasham for retaliation in violation of 20 C.F.R. §655.801. There is, however, no indication
6 that 20 C.F.R. §655.801 provides Plaintiff a private right of action.

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8 Lastly, the Twenty First Cause of Action is alleged against Defendant Vikram Sudini for
9 defamation. Plaintiff cites 28 U.S.C. § 4101 for this cause of action. This statute, however, only
10 contains definitions used when litigants are seeking enforcement of foreign judgments against
11 United States citizens who are entitled to First Amendment protections. 28 U.S.C. § 4101.
12 Specifically, “[i]n August 2010, Congress adopted the SPEECH Act (“Securing the Protection of
13 our Enduring and Established Constitutional Heritage Act.”), . . . 28 U.S.C. §§ 4101–4105.” Naoko
14 Ohno v. Yuko Yasuma, 723 F.3d 984, 1004 n.22 (9th Cir. 2013). The “law makes foreign
15 defamation judgments unenforceable in the United States unless it can be shown that such
16 judgments satisfy the protections of freedom of speech and press guaranteed by both the First
17 Amendment to the United States Constitution and the constitution of the state in which the
18 domestic court is located.” Id. Similarly, the Twelfth Cause of Action against Defendant Cronous
19 for breach of contract also cites to a statute defining terms in the Fair Labor Standards Act. See 29
20 U.S.C. § 203. Accordingly, under the facts alleged by Plaintiff, her proposed cause of action for
21 defamation and breach of contract fail as a matter of law.
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24 In conclusion, the Court finds that allowing Plaintiff to add these causes of action, as
25 alleged in the proposed Fourth Amended Complaint, would be futile because there is no indication
26 that the alleged violations of these statutes provide Plaintiff with a private right of action.
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28 **2. Proposed Causes of Action that are not Futile**

1 The Court, however, finds that allowing Plaintiff to amend the following causes of action
 2 as alleged in the proposed Fourth Amended Complaint would not be futile: (1) the Tenth Cause of
 3 Action against Defendants Eis and Cronous for involuntary servitude in violation of 18 U.S.C. §
 4 1584 and forced labor in violation of 18 U.S.C. § 1589 and (2) the Eleventh Cause of Action
 5 against these Defendants for trafficking with respect to peonage, slavery, involuntary servitude, or
 6 forced labor in violation of 18 U.S.C. § 1590. Although these are criminal statutes, 18 U.S.C. §
 7 1595 confers a private right of action against those alleged to violate these statutes. See 18 U.S.C.
 8 § 1595(a) (“An individual who is a victim of a violation of this chapter may bring a civil action
 9 against the perpetrator . . . in an appropriate district court of the United States and may recover
 10 damages and reasonable attorneys fees.”). Providing that Plaintiff alleges more facts, the Court
 11 finds that amendment under these causes of action would not be futile.
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14 Additionally, the Twenty Second Cause of Action is alleged against Defendants Eis and
 15 Cronous for a Civil RICO violation. “The elements of a civil RICO claim are as follows: (1)
 16 conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate
 17 acts) (5) causing injury to plaintiff’s business or property.” Living Designs, Inc. v. E.I. Dupont de
 18 Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005) (internal quotation marks omitted). Providing
 19 that Plaintiff alleges more facts, the Court finds that amendment to this cause of action would not
 20 be futile.
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22 **c. Jurisdiction and the Rest of the Causes of Action**

24 Finally, the Court notes that it has some doubt as to whether it has jurisdiction over this
 25 matter. The proposed Fourth Amended Complaint asserts that this Court has jurisdiction under 28
 26 U.S.C. §1331 and 28 U.S.C. § 1964 for Plaintiff’s Civil RICO claims. Whether federal question
 27 jurisdiction exists in a given case is governed by the “well-pleaded complaint rule.” Caterpillar
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1 Inc. v. Williams, 482 U.S. 386, 392 (1987). Under this rule, the federal question “must be disclosed
2 upon the face of the complaint, unaided by the answer.” Gully v. First Nat’l Bank in Meridian, 299
3 U.S. 109, 113 (1936).

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5 Yet, the following causes of action do not cite federal statutes: the Third Cause of Action
6 against Defendant Eis for fraudulent misrepresentation, the Fourth Cause of Action against
7 Defendants Eis and Cronous for fraud and false promise, the Fifth Cause of Action against
8 Defendants Eis and Cronous for fraudulent concealment, the Thirteenth Cause of Action against
9 Defendant Cronous for promissory fraud, the Fourteenth Cause of Action against Defendant
10 Swapna Pasham for unlawful termination, and the Twentieth Cause of Action against Defendants
11 Eis and Cronous for intentional infliction of emotional distress. Additionally, presuming that these
12 are intended to be state law causes of action, the proposed amended complaint does not assert that
13 this Court has supplemental jurisdiction over them. Indeed, the supplemental jurisdiction statute,
14 28 U.S.C. § 1367, grants federal courts supplemental jurisdiction over claims over which no
15 original jurisdiction exists.
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18 Moreover, the factual allegations seem to suggest that the events underlying all Plaintiff’s
19 causes of action took place in a different state. Therefore, it is unclear whether the facts, as alleged,
20 make a prima facie showing that this Court has personal jurisdiction over the Defendants. See
21 Boschetto v. Hansing, 539 F.3d 1011, 1015 (9th Cir. 2008) (“Absent an evidentiary hearing this
22 court “only inquire[s] into whether [the plaintiff’s] pleadings and affidavits make a prima facie
23 showing of personal jurisdiction.”).

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25 Nevertheless, the Court, for the reasons stated above, does not find amendment in this
26 matter to be futile. Because it is unclear whether this Court has jurisdiction over these remaining
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1 causes of action, Plaintiff is granted leave to amend to add allegations supporting this Court's
2 jurisdiction and clarifying under what statutes these remaining causes of action are brought under.

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4 **d. Summary**

5 The Court acknowledges that it previously told Plaintiff that it would allow her one final
6 opportunity to file a complaint that followed the Federal Rules of Civil Procedure. The Court finds
7 that, liberally construing her proposed Fourth Amended Complaint, she has complied. The Court
8 nonetheless finds that the deficiencies discussed above warrant Plaintiff being granted leave to
9 amend to address them.

10 The Court finds that providing leave to amend the following proposed causes of action and
11 allegations would not be futile: the Third Cause of Action, the Fourth Cause of Action, the Fifth
12 Cause of Action, the Tenth Cause of Action, the Eleventh Cause of Action, the Thirteenth Cause
13 of Action, the Fourteenth Cause of Action, the Twentieth Cause of Action, and the Twenty Second
14 Cause of Action. Additionally, Plaintiff is granted leave to amend the proposed Twelfth Cause of
15 Action (Breach of Contract), the Sixteenth Cause of Action (Retaliation), and the Twenty First
16 Cause of Action (Defamation) if she can properly allege them asserting a proper federal or state
17 statute. As discussed above, Plaintiff is also granted leave to allege additional facts asserting the
18 Court's jurisdiction over these causes of action and the remaining Defendants.

19 The Court, however, will not grant Plaintiff leave to amend to add the following proposed
20 causes of action to her complaint, because it finds that doing so would be futile: the First Cause of
21 Action, the Second Cause of Action, the Sixth Cause of Action, the Seventh Cause of Action, the
22 Eighth Cause of Action, the Ninth Cause of Action, the Fifteenth Cause of Action, the Seventeenth
23 Cause of Action, the Eighteenth Cause of Action, the Nineteenth Cause of Action, the Twenty
24 Third Cause of Action, Twenty Fourth Cause of Action, the Twenty Fifth Cause of Action, the
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1 Twenty Sixth Cause of Action, the Twenty Seventh Cause of Action, and the Twenty Eighth Cause
2 of Action. The Court also finds that, under the facts alleged, Plaintiff cannot assert causes of action
3 against WHD, ARB, Sneed, and Brown.
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6 **IV. CONCLUSION**

7 **IT IS THEREFORE ORDERED** that Plaintiff's MOTION to Amend 20 Amended
8 Complaint (ECF No. 26) is GRANTED in part and DENIED in part.

9 **IT IS FURTHER ORDERED** that Plaintiff shall until **April 27, 2023** to file a motion to
10 amend her complaint and attach a complaint consistent with this Order.
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12 **DATE:** March 31, 2023.

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15 **RICHARD F. BOULWARE, II**
16 **UNITED STATES DISTRICT JUDGE**
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